Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

ELOISE BLOUNTT,

Petitioner,

v.

DANIEL R. GLICKMAN, Secretary of United States Department of Agriculture, and UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the United States Court of Appeals for the Seventh Circuit erroneously found that Petitioner did not create a genuine issue of material fact concerning her pretextual termination.

II. Whether the United States Court of Appeals for the Seventh Circuit erroneously found that the MSPB decision adverse to Blountt was not arbitrary, capricious, an abuse of discretion, or unsupported by substantial evidence.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully asks this Court to issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review that court's judgment and opinion entered on March 16, 1999.

OPINIONS BELOW

The March 16, 1999 decision of the United States Court of Appeals for the Seventh Circuit is not published, and is reprinted in the appendix to this petition. The opinion of the District Court for the Northern District of Illinois, Eastern Division, Civil No. 96 C 6295 is not published, but can be found at 1998 U.S. Dist. Lexis 9177 (N.D. Ill.) and is reprinted in the appendix to this petition.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered its judgment on March 16, 1999. No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF CASE

The United States District Court for the Northern District of Illinois asserted jurisdiction under 42 U.S.C. § 2000e *et seq.*, 29 U.S.C. § 633, 791, 5 U.S.C. § 7703(b)(2) and 42 U.S.C. § 1331. The United States Court of Appeals for the Seventh Circuit Court of Appeals asserted jurisdiction pursuant to 28 U.S.C. § 1291.

Petitioner, Eloise Blountt, ("BLOUNTT"), was hired by the Respondent, The United States Department of Agriculture, ("USDA"). BLOUNTT was initially employed as a secretary and was subsequently promoted to the position of Food Program Specialist in 1992. She received exemplary performance evaluations throughout her employment with the USDA, and was promoted to various grades of pay. BLOUNTT's attendance was excellent until March, 1995.

From 1993 through 1995, BLOUNTT was frequently criticized and harassed by her two supervisors, Carla McGill Yearby, ("Yearby"), and Colleen Borjas, ("Borjas"). Yearby and Borjas gave BLOUNTT conflicting orders, including, on one occasion, when certain assignments should be completed. When BLOUNTT tried to explain the situation, Borjas screamed at her. BLOUNTT was often expected to do the work of two employees, when co-workers felt that they were being overworked.

In March, 1995, following a conflict with her supervisor, BLOUNTT took her annual leave on March 9 and 10, and then sick leave from March 13 to 16. During this time, BLOUNTT was examined and treated by Dr. Waverly Clanton, for stress related symptoms. On March 14, 1995, Dr. Clanton sent a letter to the USDA explaining that BLOUNTT was under his care for anxiety attacks and severe stress. Dr. Clanton also explained that BLOUNTT was suffering from insomnia, loss of appetite, and high blood pressure. He also noted that BLOUNTT's medical problems were "primarily" job related. BLOUNTT's doctor recommended that she take an indefinite leave of absence and possibly undergo psychiatric counseling. Accordingly, BLOUNTT submit-

ted several requests for unpaid leave because of her condition between March and June, 1995.

On March 21, the USDA wrote Dr. Clanton and requested additional information regarding BLOUNTT's request for leave. Dr. Clanton did not respond, so the USDA then sent follow-up correspondence on April 13, 1995, requesting that Dr. Clanton comply. Dr. Clanton never responded to the USDA's request, nor did he return BLOUNTT's telephone calls. The USDA granted BLOUNTT leave until April 16, 1995. Finally, in late April, 1995, Dr. Clanton's office called BLOUNTT and told her that they would not be providing any more medical documentation. BLOUNTT then changed her request from paid sick leave to leave without pay, ("LWOP").

On April 24, 1995, BLOUNTT filed a grievance against the USDA, complaining of "abuse and harassment" and "discrimination." On May 1, 1995, Sandra Slayton, ("Slayton"), Petitioner's supervisor, responded by letter, charging her with away without leave status, ("AWOL"), because she allegedly failed to submit adequate medical documentation.

Subsequently, on May 8, 1995, BLOUNTT filed an informal charge of discrimination with Respondent's Equal Employment Opportunity ("EEO") Counselor, Travis Jones. BLOUNTT also registered her complaints with Mike Sherman at the Office of Civil Rights, verbally on May 17, 1995, and then subsequently by writing on May 22, 1995.

Two days later, on May 24, 1995, Slayton proposed BLOUNTT's termination on the basis that she was AWOL. On May 26, 1999, Jim Fruge, ("Fruge"), the

USDA's regional manager, learned from the Office of Civil Rights Enforcement that BLOUNTT complained of discrimination on the basis of her medical condition.

On June 15, 1995, BLOUNTT advised the USDA that she was seeing a psychiatrist, Dr. Gerson Kaplan, and that Dr. Kaplan would provide her employer with a medical note. Fruge called Dr. Kaplan and requested that he send a note by June 23. Thereafter, on June 21, 1995, Dr. Kaplan sent a letter advising the USDA that he was treating BLOUNTT for a "depressive order with anxiety." Dr. Kaplan found that her symptoms included insomnia, severe anxiety, loss of appetite and weight, and a feeling of hopelessness. He further stated that BLOUNTT would be undergoing weekly psychotherapy sessions and that she planned to return to work on June 26, 1995. Dr. Kaplan ultimately recommended that BLOUNTT be transferred to a different position.

At the MSPB hearing, Slayton conceded that Dr. Kaplan's report contained all of the information that she had requested, and that Dr. Clanton's earlier letter was sufficient to justify BLOUNTT's medical leave for March and April, 1995.

On June 26, 1995, the date that BLOUNTT was scheduled to return to work, and only after Dr. Kaplan submitted his medical report, Thomas Pate, a USDA administrator, decided to terminate BLOUNTT allegedly for her AWOL status. Pate stated that he came to this decision because: (1) BLOUNTT allegedly failed to report to work from April 17 to June 23 without being granted leave; (2) BLOUNTT purportedly failed to establish valid reasons for her absence as required under federal regulations; and (3) her alleged failure to cooperate with her supervisors to determine her status.

BLOUNTT challenged the decision to terminate her with the MSPB, arguing that her termination was not justified. The MSPB found in favor of the USDA. BLOUNTT then appealed to the EEOC, which affirmed the administrative agency's ruling. BLOUNTT then filed a complaint in the United States District Court for the Northern District of Illinois, where she alleged handicap discrimination, retaliation, and requested review of the MSPB decision. The district court granted summary judgment in favor of the USDA, and BLOUNTT appealed. The United States Court of Appeals for the Seventh Circuit affirmed the district court's ruling.

Petitioner, Eloise Blountt, now seeks a writ of certiorari from this Court to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

REASONS FOR GRANTING THE WRIT

I.

Certiorari Should Be Granted Because The United States Court Of Appeals For The Seventh Circuit Erroneously Found That Petitioner Did Not Create A Genuine Issue Of Material Fact Concerning Her Pretextual Termination.

In its opinion, the Seventh Circuit Court of Appeals did not address whether BLOUNTT established a *prima facie* case of retaliation; rather, it assumed that she did. The court went on to hold that the USDA had articulated a non-retaliatory reason for BLOUNTT's termination, and held that BLOUNTT failed to establish pretext. Since BLOUNTT properly raised a genuine issue of material fact, the writ of certiorari should be granted.

In the case sub judice, BLOUNTT submitted reports from two physicians—Dr. Clanton and Dr. Kaplan. As requested, Dr. Kaplan submitted his report prior to the USDA's deadline. It contained detailed findings, a prognosis, and a recommended plan for BLOUNTT's return to work—that she work under another supervisor. At the hearing, Slayton conceded that both Dr. Clanton's note and Dr. Kaplan's report had provided sufficient information.

A plaintiff can prove that an employer's proferred reasons for an employment decision are pretextual by one of two methods: (1) by showing that a discriminatory reason more likely motivated the employer; or (2) by showing that the employer's proferred explanation is unworthy of credence. *Konowitz v. Schnadig Corp.*, 965 F.2d 230, 232 (7th Cir. 1992). For summary judgment purposes, the non-moving party must only produce evidence from which a rational trier of fact could infer that the employer lied about its preferred reasons for discharge. *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120, 1124 (7th Cir. 1994); *Shager v. Upjohn Co.*, 913 F.2d 398, 401 (7th Cir. 1990). To prove pretext, the plaintiff must present evidence that the employer "made up" its reason for the discharge. *Castleman v. Acme Boot Co.*, 959 F.2d 586, 588 (7th Cir. 1992). A grant of summary judgment which turns on the issue of discriminatory intent should be approached with special caution. *Courtney v. Biosound, Inc.*, 42 F.3d 414 (7th Cir. 1994).

Why would the USDA have afforded Dr. Kaplan until June 23, 1995 to furnish a report, which he did, and then disregard it, and terminate BLOUNTT? Clearly, the USDA intended to terminate BLOUNTT regardless

of whether Dr. Kaplan submitted a report at all, and regardless of his findings and prognosis. If, in fact, the USDA had a legitimate non-retaliatory reason for terminating BLOUNTT, why did it even bother requesting a report from Dr. Kaplan? While Slayton testified at the hearing that she wished the report would have been submitted earlier, clearly, Dr. Kaplan furnished the requested information in a timely manner—*prior* to the USDA's deadline. In light of BLOUNTT's prior exemplary work record, and the extraordinarily suspect act of terminating BLOUNTT immediately after Dr. Kaplan submitted a detailed medical report, BLOUNTT has certainly raised a genuine issue of material fact as to the USDA's intent. Consequently, the United States Court of Appeals for the Seventh Circuit's opinion and judgment affirming the United States District Court for the Northern District of Illinois granting the USDA summary judgment on BLOUNTT's retaliation claim, should be reversed. *Castleman v. Acme Boot Co.*, 959 F.2d 586, 588 (7th Cir. 1992); *Courtney v. Biosound, Inc.*, 42 F.3d 414 (7th Cir. 1994).

Certiorari should be granted so that BLOUNTT's retaliation claim may be properly reviewed.

II.

Certiorari Should Be Granted Because The United States Court Of Appeals For The Seventh Circuit Erroneously Found That The MSPB Decision Adverse To Blountt Was Not Arbitrary, Capricious, An Abuse Of Discretion, Or Unsupported By Substantial Evidence.

In the instant case, BLOUNTT was originally under the care and treatment of Dr. Clanton. Dr. Clanton at

first submitted a report concerning his treatment of BLOUNTT, but later became uncooperative, despite BLOUNTT's numerous attempts to provide the USDA with additional documentation. At that time, BLOUNTT sought to change her work status from sick leave to leave without pay. BLOUNTT then sought the care and treatment of Dr. Kaplan, who timely provided the USDA with the requested medical information.

At the MSPB hearing, Dr. Kaplan unequivocally testified that BLOUNTT was psychologically bereft of cooperating more with the USDA than she had. Dr. Kaplan found that BLOUNTT's severe symptoms made her unable to answer the USDA's repeated threats and demands for more detailed medical information.

Under the arbitrary and capricious standard, the court must weigh numerous factors: the impartiality of the decisionmaking body, the complexity of the issues, the process afforded the parties, the extent to which the decisionmakers utilized the assistance of experts where necessary, and finally, the soundness of the fiduciary's ratiocination. *Chalmers v. Quaker Oats Co.*, 61 F.3d 1340, 1344 (7th Cir. 1995). Under the arbitrary and capricious standard, the scope of the Seventh Circuit Court of Appeals' review was required to be "searching and careful." *Bowman Transportation v. Arkansas-Best Freight System*, 419 U.S. 281, 285 (1974). The agency must articulate a rational connection between the facts found and the choices made. *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962).

The MSPB's decision upholding the USDA's right to terminate BLOUNTT on the basis of her alleged AWOL status was clearly arbitrary, capricious, an abuse of

discretion, and unsupported by substantial evidence. As requested, Dr. Kaplan did timely provide a detailed medical report concerning BLOUNTT. Further, at the administrative hearing, BLOUNTT's treating physician testified that BLOUNTT could do no more in providing information to the USDA. In light of the timely provided medical information, and BLOUNTT's medically diagnosed inability to further comply, The United States Court Of Appeals For The Seventh Circuit's judgment and opinion finding that the MSPB's decision, upholding BLOUNTT's termination, should be reversed.

CONCLUSION

For the aforementioned reasons, Petitioner, Eloise Blountt, respectfully prays that this Honorable Court grant *Certiorari*, reverse The United States Court Of Appeals For The Seventh Circuit, and remand for further proceedings.

Respectfully submitted,

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